had for years been fully adequate, it was not sufficient to fill the abnormal demands made during this period. The Public Service Commission ordered the respondent to connect no more consumers, and pursuant to this order, the respondent refused the relator its connection. *Held*, that a writ of mandamus should be granted compelling the respondent to give the relator its connection. *Park Abbott Realty Co.* v. *Iroquois Natural Gas Co.*, 168 N. Y. Supp. 673.

For a discussion of this case, see Notes, page 1028.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — WHAT ARE REASONABLE RATES AFTER TERMINATION OF FRANCHISE. — After the expiration of a water company's franchise the city passed an ordinance fixing the rates to be charged by it, providing, *inter alia*, for annual hydrant rentals which were to include such hydrants as the Council might thereafter require. The company sued to have the city enjoined from enforcing this ordinance on the ground that the rates fixed were confiscatory. *Held*, that in determining the reasonableness of the rates the plant was to be valued as a plant in use, and the item of "going value" was to be considered. *City and County of Denver* v. *Denver Union Water Co.*, 38 Sup. Ct. Rep. 278.

The state has of course the right to regulate the rates of public service companies. *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347. In order not to constitute a taking of property without due process these rates must allow a reasonable return on the value of the company's plant. *Brymer* v. *Butler Water Co.*, 179 Pa. 231, 36 Atl. 249. The usual method of valuing the plant is to find the cost of replacement, deduct the depreciation, and add an item for "going concern value." The latter is the additional value of the plant over its value as an assembled plant due to the fact that it is in actual operation. In a rate case at least the fact that the company is or is not making profits is not to be considered as an item of "going value." *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *National Waterworks Co.* v. *Kansas City*, 62 Fed. 853; *Spring Valley Waterworks* v. *San Francisco*, 192 Fed. 137. In the principal case the company's franchise had expired, and as between the parties the city had a right to compel the company to remove its pipes within a reasonable time. *Laighton* v. *Carthage*, 175 Fed. 145. It was argued for the city that the plant was therefore to be valued as junk and the item for going value was erroneous. But it would seem that the city's duty to the people would defeat its right to require a removal of the pipes until a substitute had been provided. In any event the city by its regulating ordinance in effect gave the company a license for an indefinite term. *Cedar Rapids Water Co.* v. *Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081. So long as this license continued the company was subject to regulation and bound to supply water. *Laighton* v. *Carthage*, *supra*. The plant was a going one and was properly valued as such. *Cedar Rapids Water Co.* v. *Cedar Rapids*, *supra*. The decision seems not only sound but eminently desirable.

STATE — SUIT AGAINST AN OFFICER NOT NECESSARILY SUIT AGAINST THE STATE. — Upon the insolvency of a bank against which the plaintiff held a certificate of deposit, the defendant who was Bank Commissioner under a Deposit Guarantee Plan, took possession of the bank and its assets. It was alleged that he exercised his power so arbitrarily and capriciously that plaintiff was damaged to the extent of his certificate of deposit. *Held*, that this was not an action against the state. *Johnson* v. *Lankford*, 38 Sup. Ct. Rep. 203.

That the Eleventh Amendment secures to the states immunity from private suits has long been established. *Hans* v. *Louisiana*, 134 U. S. 1. When a suit is against the state and when against an officer personally is not always easy to determine. The test — whether the state is a party of record — has long

been discarded. See 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 621. It is said the question "must be determined by a consideration of the nature of the case as presented on the whole record." *In re Ayers*, 123 U. S. 443. Obviously a suit against an officer for invasion of private rights, though done under color of office, is against him personally. *Scully* v. *Bird*, 209 U. S. 481. This is true also where those acts are done in execution of unconstitutional legislation. *Osborn* v. *Bank of United States*, 9 Wheat. (U. S.) 738; *Poindexter* v. *Grenshaw*, 114 U. S. 270. Suit to recover property wrongfully taken or withheld by an officer is against him *qua* wrongful possessor, and hence is maintainable. *United States* v. *Lee*, 106 U. S. 196; *Morrill* v. *Am. Reserve Bond Co.*, 151 Fed. 305. *Cf. Rolston* v. *Missouri Fund Com'rs*, 120 U. S. 390. But if the property loses its identity, *e. g.*, taxes collected unlawfully and paid into the treasury, the theory of the action changes from a suit to recover property to one for the performance of an implied obligation to pay — an obligation of the state. *Smith* v. *Reeves*, 178 U. S. 436. Though the officers are under a duty to carry out the obligations of the state, that duty, as in any case of agency, extends only to the principal, the state, and not to third persons. Suit against the officers to secure performance or damages for nonperformance of those obligations must necessarily proceed on the theory that it is against the state and as such is not maintainable. *Louisiana* v. *Jumel*, 107 U. S. 711; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151. The principal case alleges capricious misconduct, whereby plaintiff's property has been destroyed. The decision conforms with the general principle that if a person acting affirmatively exercises a power in wanton disregard of the rights of others, he becomes an individual trespasser, even though purporting to act in the capacity of an officer. See GUTHRIE, THE FOURTEENTH AMENDMENT, 176.

SURETYSHIP — SURETY'S DEFENSES — PAYMENT OF DEBT OWED BY CREDITOR TO PRINCIPAL DEBTOR. — By statute a landlord had a lien on crops raised by the tenant, and could follow the crops into the hands of a purchaser. The defendant purchased the crops of a tenant who had not paid his rent. Subsequently, the landlord employed the tenant and paid him as wages a sum greater than the amount of the rent. Then the landlord tried to enforce his lien against the purchaser. *Held*, that he could not recover. *Scott & Garrett* v. *Green River Lumber Co.*, 77 So. 309 (Miss.).

When one person owns property which is security for the debt of another, the property is in effect surety for the debtor. See 1 BRANDT, SURETYSHIP AND GUARANTEE, § 43. The question in this case is whether the payment of wages to the principal debtor by the creditor discharges the surety. Release of security by the creditor discharges *pro tanto* his claim against the surety. *Henderson* v. *Huey*, 45 Ala. 275; *Kirkpatrick* v. *Howk*, 80 Ill. 122. Mere failure, however, on the part of the creditor to sue or to take other steps to enforce the obligation does not destroy the liability of the surety. *Schroeppell* v. *Shaw*, 3 N. Y. 446; *Brick* v. *Freehold National Bank*, 37 N. J. L. 307. The payment by the creditor of a debt owed by him to the principal debtor, instead of using it as a set-off lies somewhere between these two groups of cases. It is generally held that if a creditor bank fails to satisfy a debt out of the general deposits of the principal, but permits him to withdraw the deposits, that does not discharge the surety. *National Bank* v. *Peck*, 127 Mass. 298. See *Strong* v. *Foster*, 17 C. B. 201, 224. *Contra*, *McDowell* v. *Bank of Wilmington*, 1 Harr. (Del.) 369. *A fortiori*, it would seem that for an ordinary creditor thus to pay the debtor would not destroy his right against the surety, for whereas a bank has the right to appropriate money due on a general deposit to the payment of a depositor's obligations, an ordinary creditor has no right to make such a set-off, but must sue or wait to be sued, and let the court make the set-off. See *White's Adm'r* v. *Life Association of America*, 63 Ala. 419, 430. The principal case is not in